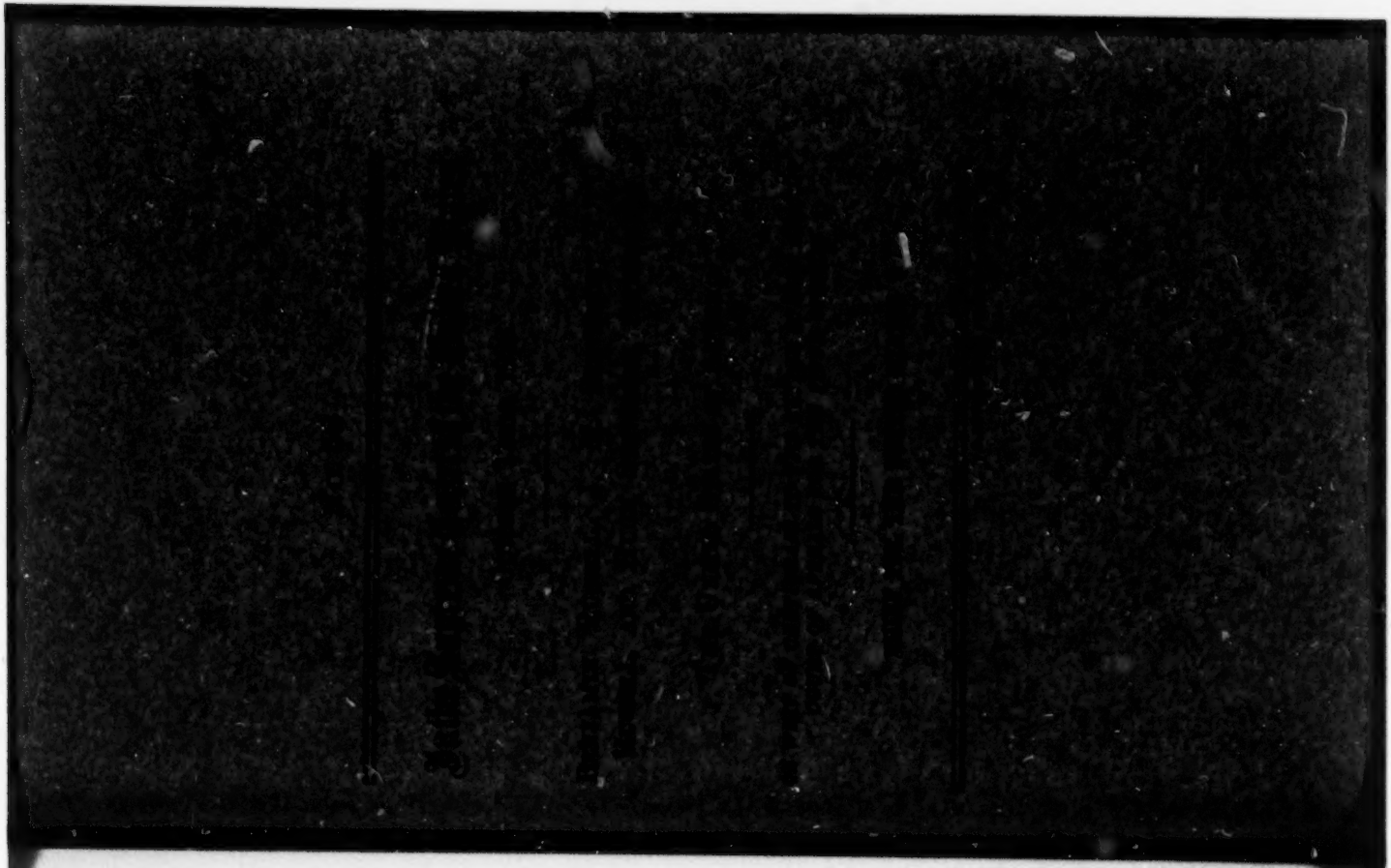

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 58

BENJAMIN RUSSELL, J. M. STEVERSON, T. C. RUSSELL, and Hugh Steverson, Petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The United States District Court for the Northern District of Alabama filed no written opinion. The opinion of the Circuit Court of Appeals (R. 29) is reported in 22 F. (2d) 249.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 4, 1927. (R. 33.) Petition for certiorari was filed January 30, 1928. Certiorari was granted March 12, 1928. Jurisdiction is

conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether Congress, when enacting the Revenue Act of 1924, providing that suits to collect taxes for 1918 and later years might be brought within six years after the date of the assessment (provided the assessment was made within the time allowed by law and the claim of the United States was not barred when the Act of 1924 was passed), intended to differentiate, in thus extending the time for suit (the old limitation being five years from the date of the return) between assessments made before and those made after the passage of the Revenue Act of 1924. More narrowly stated, the question is whether the operation of the statute urged by the Government, which is that it extended the period of limitations as to suits on assessments made prior to its passage, as well as those made afterward, is an operation which "affects the assessment" within the meaning of Section 278(c).

STATUTES INVOLVED

Section 250(d) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, is as follows:

> Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commis-

> sioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides as follows:

> The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, * * * and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act * * *

The applicable sections of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300, 301, 303, 352, approved June 2, 1924, are:

> SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057 (a) (2).)
>
> SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within

which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)

(c) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277. (U. S. C. Title 26, Sec. 1064.)

SEC. 283. This title shall take effect as of January 1, 1924.

SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c);

Title II (called "Income Tax") as of January 1, 1924;

* * * * *

(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 *and except as otherwise specifically provided in this Act*) remain in force for the assessment and collection of all taxes imposed by such Act, and * * * by prior income, war-profits, or excess-profits tax acts * * *. (U. S. C. Title 26, Sec. 1260.) (Italics ours.)

STATEMENT

This was a suit in equity against the former stockholders of the Pine Lumber Company, a dissolved corporation, for recovery of $4,757.34 additional income and profits taxes assessed against that corporation for the year 1918. (R. 1-12.) The correct amount was later stipulated to be $4,681. (R. 23.)

The corporation's income and profits tax return for 1918 was filed June 12, 1919. (R. 4.) In March, 1924, upon audit of said return by the Bureau of Internal Revenue, an additional assessment of $4,757.34 was made against the corporation. (R. 6, 7.)

The corporation having dissolved (R. 10) and distributed its assets to its stockholders, the petitioners herein (R. 10), the United States, on January 23, 1925, filed its bill in equity for the collection of the unpaid taxes due from the corporation (R. 1). Liability was asserted upon the theory that the stockholders received the assets of the corporation upon its dissolution charged with a trust in favor of the United States for the taxes due from the corporation. (R. 11.)

The petitioners filed a motion to strike the original bill of complaint on the ground, among others, that the suit was barred by the statute of limitations. (R. 17.)

The District Court granted the motion to strike on the ground that the action was barred. (R. 22.) Upon appeal the Circuit Court of Appeals reversed the decree and remanded the case. (R. 33.)

By way of summary the important facts to be remembered are:

The taxes in question were for the year 1918.

The return was filed June 12, 1919.

The assessment was made in March, 1924.

The Revenue Act of 1924 was enacted June 2, 1924.

The period of limitations, as it stood prior to the enactment of the Revenue Act of 1924, expired June 12, 1924, and the assessment could have lawfully been made after the passage of the Act of 1924.

The suit was commenced January 23, 1925.

SUMMARY OF ARGUMENT

I. The rule that doubt as to whether a statute imposes a tax should be resolved in favor of the taxpayer has no application here. The question is whether a claim for tax, admittedly imposed, has become barred by a statute of limitations. It is settled that the United States will not be held barred by a statute of limitations unless, upon a strict construction in its favor, the case is fairly within the terms and purpose of the statute.

The number of Federal courts which have construed this statute in favor of the United States and the strength of their reasoning makes a case for the application of the rule just stated.

II. Section 278 of the Revenue Act of 1924 fixed the period of limitation for suits to collect taxes imposed under prior Acts at six years from the date of the assessment, without regard to whether the assessment was made before or after the passage of the 1924 Act, provided only that the assessment was made within the time allowed by prior Acts and the claim had not become barred at the time of the enactment of the Act of 1924.

The words of Section 278(d) allow the inclusion of cases where assessments were made before as well as after the passage of the Act, and the extension of the time for suit did not affect the assessment within the meaning of Section 278(c)(2). The provision in Section 278(c)(1) of the Act of 1924 shows that Congress intended to deal with cases

under prior Acts, where the period of limitation had started to run but had not expired when the Act was passed. It is conceded by petitioners, and it is clearly true, that if in this case the assessment had been delayed, as it might have been, until after the passage of the 1924 Act, the six-year limitation after assessment would have applied.

No good reason has been suggested why Congress should have intended to make a distinction between assessments, under prior Revenue Acts, made before and those made after the passage of the 1924 Act. The ambiguity in the 1924 Act was removed by a clarifying provision in the 1926 Act.

III. An Act is not retroactive in any proper sense merely because its operation may depend on an occurrence anterior to its passage. The Act of 1924 expressly deals with taxes imposed under prior statutes, returns previously made under prior statutes, and with cases where limitations on suits for taxes under prior Acts had commenced to run but had not expired.

It merely extended the time for suit in cases where the right to sue had not expired.

IV. The Congressional Committee Reports support the contention of the United States that Congress did not intend to make a distinction between assessments made before and those made after the passage of the 1924 Act, and did not intend that procrastination on the part of the Bureau of Internal Revenue in making an assessment should

be the basis for applying the provision that suits might be brought within six years.

ARGUMENT

I

AMBIGUITIES IN A STATUTE OF LIMITATIONS OPERATING AGAINST THE UNITED STATES SHOULD BE RESOLVED IN ITS FAVOR

Doubt as to whether a taxing statute imposes a tax should be resolved in favor of the taxpayer (*Eidman* v. *Martinez*, 184 U. S. 578; *Shwab* v. *Doyle*, 258 U. S. 529), but that rule has no application here. That the tax was imposed by the Revenue Act of 1918 is conceded, and the question is whether the claim of the United States has become barred by its statute of limitations. Such a question, in the event of ambiguity or uncertainty, should be resolved in favor of the United States. In *In re McClure Company*, 21 F. (2d) 538, dealing with the question here presented, the court said (p. 540):

> Nor is this a case for applying the principle that, in construing tax statutes, doubt is to be resolved in favor of the taxpayer. That principle may be invoked in determining whether or not the tax has been imposed. When applied, it operates to relieve equally all persons sought to be taxed. Here it is not contended that the tax claim is not due, but only that this taxpayer is relieved by the delay of the taxing officers. To solve doubt

> in favor of this taxpayer is but to shift his just burden to other taxpayers. It would deprive the Government of a right, which it undoubtedly had, by a construction of an act of grace, its own voluntary statute of limitations.

In *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346, it was said (p. 349):

> Undoubtedly the United States will not be held barred by a general statute of limitation unless, upon a strict construction in its favor, the United States and the claim sought to be enforced fairly may be held to be within the terms and purpose of the statute. *Dupont De Nemours & Co.* v. *Davis*, 264 U. S. 456, 462.

Many other cases hold that the United States is not bound by a statute of limitations unless the intention of Congress that it should be bound is clearly manifested. (*United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310.)

The conclusions of lower Federal courts on the question involved in this case justify the assertion that at least the meaning of the statute is doubtful enough to justify the application of the rule just stated. Those courts which have resolved the question against the United States are the United States District Court of Pennsylvania in *United States* v. *Whyel* and *Wilhelm Co.* v. *Heiner* (19

F. (2d) 260; 21 F. (2d) 463) and the Circuit Court of Appeals for the Third Circuit (Circuit Judge Woolley dissenting) in the same cases (*United States* v. *Whyel*, 28 F. (2d) 30); also the Supreme Court of the District of Columbia in *United States* v. *Cabot*, 54 Washington Law Reporter, 590, and the District Court for Montana in *Brownfield-Canty Carpet Company* v. *Rasmussen*, decided July 22, 1927, not yet reported. The opinion in the latter case is printed in the appendix to this brief.

On the other hand, those Federal courts which have sustained the position of the United States are the Circuit Court of Appeals for the Fifth Circuit, in its decision below; the District Court for the Northern District of Georgia in *In re McClure Company*, 21 F. (2d) 538; and the District Court for Southern District of California in *United States* v. *Penn*, 23 F. (2d) 714. See also *United States* v. *Board*, 14 F. (2d) 459.

The United States Board of Tax Appeals, on the authority of the District Court decisions in the *Whyel* and *Wilhelm Co.* cases, and of the *Cabot* case, in the Supreme Court of the District of Columbia, originally held against the contention of the United States (*Reliance Mfg. Co.* v. *Commissioner*, 7 B. T. A. 583), but afterwards, on the authority of the decision of the Circuit Court of Appeals for the Fifth Circuit in this case and of the decisions in *In re McClure Co.*, *supra*, and *United States* v. *Board*, *supra*, overruled its earlier decision and has sus-

tained the contention of the United States. (*Art Metal Works* v. *Commissioner*, 9 B. T. A. 491; *City Baking Co.* v. *Commissioner*, 10 B. T. A. 593.) An excellent opinion on the point is that of Judge Sibley in *In re McClure Co.*, 21 F. (2d) 538.

II

SECTION 278 OF THE REVENUE ACT OF 1924 EXTENDED THE PERIOD OF LIMITATIONS FOR THE COLLECTION OF TAXES AFTER ASSESSMENTS UNDER PRIOR ACTS, WITHOUT REGARD TO WHETHER THE ASSESSMENT WAS MADE BEFORE OR AFTER THE PASSAGE OF THE 1924 ACT, PROVIDED SUIT WAS NOT BARRED AT THE TIME OF ITS PASSAGE AND THE ASSESSMENT WAS WITHIN THE PRESCRIBED TIME

Under Section 250 (d) of the Revenue Act of 1918 it was provided that assessments must be made within five years after the return was filed and that no suit or proceeding for the collection of the tax should be begun after the expiration of five years from the date of the return. Under that Act the filing of the return started running the period of limitation both as to assessment and as to suit for collection, and also as to distraint (*Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346), and the period was the same as to assessments and suits.

When the Revenue Act of 1921 was passed it provided, in Section 250 (d), that assessments under it and succeeding Acts must be made within four years after the return was filed, and assessments under prior Acts within five years from the

date the return was filed, and it fixed the time for suit as to taxes imposed under it as well as under prior Acts at five years from the date of the return. This statute still left the date of the return as the start of the limitation period for assessments and suits. It left the law as it was for taxes assessed under the 1918 and prior Acts, and shortened the time for making assessments under the 1921 Act from five years to four years after the date of the return, but allowed suit to be brought to collect taxes assessed under the 1921 Act a year after the time limit for making an assessment had expired.

Section 1100(b) of the Revenue Act of 1924 provided that those parts of the Revenue Act of 1921 repealed by it should remain in force for the assessment and collection of all taxes imposed by the Act of 1921, and by prior income, war profits or excess profits tax Acts, except as provided in Sections 280 and 316 and

> except as otherwise specifically provided in this Act.

In determining whether it was otherwise specifically provided for in the Act of 1924, we turn to Sections 277 and 278.

In their discussion of Section 1100(b) of the Revenue Act of 1924, the petitioners seem to overlook the phrase "except as otherwise specifically provided in this Act."

Section 277(a) of the 1924 Act starts with the qualification "except as provided in section 278,"

so that all the provisions in Section 277 are expressly subject to the qualification contained in Section 278. Section 277 then provides that taxes imposed by the 1921 Act and the 1924 Act shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. It then provided that taxes imposed by the 1918 Act and prior Acts shall be assessed within five years after the return was filed and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. So far the 1924 Act merely reenacts the provisions of the 1921 Act, except to change the time for commencing suit to recover taxes imposed by the 1921 Act from five years to four years after the date of the return.

Section 278(d) of the 1924 Act, which qualifies Section 277, provides:

> Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

Subdivision (e) then provides:

> This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

This case turns on the question whether the words in Section 278(d) "where the assessment of the tax is made" refer to assessments under prior Acts made prior to as well as those made after the passage of the 1924 Act or only to those assessments under prior Acts made after the passage of the 1924 Act, and also on the question whether extending the time for suit after assessment "affects" the assessment within the meaning of Section 278(c)(2).

The phrase in subdivision (d) "where the assessment of the tax is made" is indefinite as to whether it refers to assessments made before or after the passage of the 1924 Act, or both, although the petitioners argue, with some force, that since the subdivision refers to assessments made as prescribed in Section 277, and the words of that are prospective, subdivision (d) relates only to assessments made after its passage. It is in subdivision (c)(1) of Section 278 that we find the most significant provision. It is to the effect that nothing in the section

shall authorize a suit for collection of the tax if at the time of the enactment of the 1924 Act such a suit was barred by the period of limitation then in existence. The fair inference from that provision is that Congress did intend by Section 278 to extend the period of limitation on suits for taxes imposed under prior Acts by making it run six years from the date of the assessment instead of four years or five years from the date of the return in cases where suit had not become barred at the time of the passage of the 1924 Act.

The petitioners admit that if an assessment of a tax imposed under the 1918 or under the 1921 Act was lawfully made within the time prescribed by those Acts, but *after* the passage of the 1924 Act, then the effect of Section 278 of the 1924 Act was to make the period of limitation on suits six years and to make the date when that period started to run the date of the assessment, and not the date of the return; but they contend that if the assessment was made before the 1924 Act was passed, *even though it could have been made afterwards*, the new provision in Section 278(d), making the date of the assessment the start for the running of the limitation period, has no application.

To concretely illustrate their contention and the real issue, the facts of this case may be used. Here, the return was filed June 12, 1919. Under the 1918 Act and the 1921 Act an assessment of taxes imposed by the 1918 Act was permitted to be made

within five years from the date of the return, which in this case made June 12, 1924, the last day to make the assessment and the last day on which to bring a suit to collect the tax. So that, at the time the Act of 1924 was passed, on June 2d of that year, neither the time for making an assessment nor the time for bringing suit had expired. If no assessment had been made prior to June 2, 1924, but had been made between June 2 and June 12, then, it is admitted by petitioners, suit to collect the tax might have been brought within six years from the date of the assessment. The assessment, in fact, was made in March, 1924, and because it was made before and not after the passage of the 1924 Act petitioners contend that Section 278(d) of the latter Act has no application and the limitation on the suit was five years from the date of the return.

The facts in *United States* v. *Cabot*, *supra*, and those in the *Whyel case*, also illustrate the point.

In the *Cabot case* a tax for the year 1919 was involved. The return was filed March 12, 1920. The period of limitations on assessments and suits was five years from the date of the return, which allowed assessment and suit as late as March 12, 1925. The assessment was made in May, 1922. According to petitioners' theory, if the assessment had been delayed, as it could have been, to some date after June 2, 1924, when the 1924 Act was passed, and prior to March 12, 1925, the time allowed for suit would have been (as provided in Section

278(d) of the Act of 1924) six years from the date of assessment, but because the assessment was made sooner than it need have been and prior to the 1924 Act the extension did not apply.

No one is able to suggest any good reason why Congress should have made any distinction under the circumstances between an assessment made before and after the passage of the 1924 Act, and it is too clear for argument that no good reason exists for any such distinction.

As will be hereafter shown, in enacting Section 278(d) Congress had in mind that a taxpayer who had received notice of claim in the form of an assessment within the statutory period therefor was suffering no hardship if a considerable period after the assessment was allowed within which the Government might bring suit. The contention of the petitioners, if successful, defeats to some extent the purpose of Congress. The result will be that the longer the Commissioner of Internal Revenue delayed in making an assessment, with notice to the taxpayer, the more favorable the position the United States is in the matter of suit, so that in the case at bar if the Treasury Department had procrastinated in levying the assessment until after June 2, 1924, as it might have done, the United States would have had six years from the date of the assessment and not five years from the date of the return within which to sue. An intent to bring about such a result should not be attributed to

Congress if it may reasonably be avoided. Of this contention the court said in *In re McClure Company* (21 F. (2d) 538, 540):

> The present contention, specifically stated, is that this tax claim, arising under the Revenue Act of 1918 (Comp. St. § 6336 1/8 et seq.) is controlled by the limitations of the act of 1921, and is barred of enforcement because the assessment was made before June 2, 1924, whereas, if the assessment had been delayed until June 3, 1924, the act of 1924 would have governed, and it would not be barred. With no logical or constitutional necessity compelling such a conclusion, it must rest solely on the words of the statutes.

What Congress thought of the point is shown by subsequent legislation. In 1926, the ambiguity in the 1924 Act and the difference of opinion about it having been disclosed, after reenacting by Section 277 (a)(3) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 58, the provisions of Section 277 (a)(2) of the 1924 Act, Congress made Section 278 (d) of the Act of 1926 read as follows (44 Stat. 59; U. S. C. Supp., Title 26, Sec. 1061):

> Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (*whether before or after the enactment of this Act*) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act),

> but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (Italics ours.)

Of this the court said in *In re McClure Company*, 21 F. (2d) 538, 541:

> This reason applies with equal force to every assessment, whether made before or after June 2, 1924. Section 278 (d) does not speak of assessments *hereafter* made, but of assessments generally. In reenacting this provision in Section 278 (d) of the Act of 1926, in order to set at rest any doubt about the intent of the words, Congress inserted a parenthesis—"(whether before or after the enactment of this Act)." (Italics ours.)

The court was clearly right in treating the change in the section made in 1926 as a clarifying provision and not as showing a change in policy.

The remaining provision petitioners rely on is that in Section 278 (c)(2), that the section shall not "affect" any assessment made. They contend that to extend the period of limitation on suits is to "affect" the assessment. Literally, this is not so. Speaking of this clause it was said in *In re McClure Company*, 21 F. (2d) 538, 541:

> An assessment on June 1, 1924, differed in nothing from one on June 3d, whether from the standpoint of the taxpayer or the government. Section 278c was not intended to make a distinction, where there was no dif-

ference. It did not exclude from the new scheme of limitations tax claims that had been assessed prior to June 2, 1924, but only declared that such assessments stood unaffected as assessments. Such an assessment, if timely and valid when made, remained a good assessment, and as capable of being a starting point for the new limitation as one made after June 2d. The *proceeding in court* here dealt with was begun long after June 2, 1924, and the second clause of 278c does not apply to it at all. It rests upon an *assessment*, to which that clause does apply, but only to declare it unaffected, as good an assessment as it ever was, and such an assessment as section 278d makes the basis for the new six-year limitation. Sections 277a(3) and 278d of the Act of 1926 are but a clarifying reenactment of 277a(2) and 278d of the Act of 1924, and should set at rest any doubt as to the original congressional intent.

III

THE CONTENTION THAT TO APPLY THE ENLARGED PERIOD FOR COLLECTION TO A TAX FOR WHICH AN ASSESSMENT WAS MADE PRIOR TO THE ENACTMENT OF THE 1924 ACT WOULD MAKE THE ACT RETROACTIVE AND OBJECTIONABLE ON THAT GROUND IS WITHOUT MERIT

To begin with, it should be noted that the 1924 Act expressly relates to and deals with taxes imposed by prior statutes, liabilities already arisen under prior statutes, and returns theretofore made under prior statutes, and it is clear that the Act expressly operates on cases where the period of

limitation on suit had already commenced to run prior to the passage of the Act, but had not expired. That is the necessary inference from Section 278 (c) (1).

Properly speaking, however, no question of retroactivity is involved. The provisions of Section 278 (d) are not retroactive even though the extended period for the collection is made applicable to taxes assessed prior to June 2, 1924. Section 278 (d) merely extended a period of limitations which had not yet fully run. "Retroactive" may be defined as affecting that which is past. *Words and Phrases*, Second Edition, Vol. 4, p. 373. Nothing that was past was affected or changed by Section 278 (d). The assessment was, it is true, in the past. The collection period authorized by prior Acts which was still running was the only thing affected. As to this there was no retroactive operation in a true sense. The statute did not reach back and revivify that which was dead. It operated only upon a right existing at the time, and merely projected an existing period for collection still further into the future. The mere fact that the enlarged period began to run from an event occurring prior to June 2, 1924, does not make the provision in question retroactive. The same thing would be true in every case where a period of limitations not yet fully run was extended in its application to an offense or act occurring before the extending statute was enacted. In *In re Scott*, 126 Fed. 981, 984, it was held that a

statute is not retroactive merely because its operation in a given case may depend upon an occurrence anterior to its passage. There is nothing obnoxious about that sort of retroactivity.

IV

CONGRESSIONAL COMMITTEE REPORTS SUPPORT THE CONTENTION OF THE UNITED STATES

In reporting the Revenue Bill of 1924 the Committee on Ways and Means of the House of Representatives in Report No. 179, 68th Congress, First Session (p. 26), said:

> Section 278 (d): This subdivision authorizes the collection, by distraint or by proceeding in court, of a tax assessed within the period prescribed in section 277. If the taxpayer *has had notice of an assessment* within the statutory period therefor, no hardship to him results from authorizing proceedings thereafter for the collection of the tax. The purpose of limitation upon assessments is to assure the taxpayer that, after the period has run and no assessment has been made, no taxes may be collected from him. If, however, the assessment is made within the prescribed period, the assessment is comparable to a judgment at law and should remain alive until the tax is paid. (Italics ours.)

When the Revenue Bill of 1924 was reported in the Senate the Committee on Finance of that body, in its Report No. 398, 68th Congress, First Session, at page 32, said with reference to Section 278 (d):

> Section 278 (d): This subdivision in the House bill authorized the collection at any time thereafter, by distraint or by a proceeding in court, of a tax assessed within the period prescribed in section 277. In order to protect the taxpayer further, a limitation of six years after the assessment of the tax has been placed upon proceedings in court and distraint for its collection. At the end of such period, the taxpayer is assured that his tax liability is finally determined.

In the Conference Report on this Section (Report No. 844, 68th Congress, First Session, p. 24) it is said:

> Amendments Nos. 112, 155, and 231: The House bill authorized the collection at any time by distraint or by a proceeding in court of a tax assessed within the prescribed period. The Senate amendment placed a limitation of 6 years after the assessment of the tax upon proceedings in court and distraint for its collection; and the House recedes on Amendments Nos. 112 and 231, and recedes on Amendment No. 155 with an amendment making a clerical change.

It is evident from these reports that Congress intended to provide an enlarged period of limitations for the collection of taxes in all cases where an assessment was made within the proper time and that it had no thought of making a distinction between assessments, depending upon whether they were made before or after the enactment of the 1924 Act. Congress wanted to assure the taxpayer that

unless he received timely notice of his assessment his liability for taxes would terminate; but it did not intend to differentiate between taxpayers who received notice of assessment before the passage of the 1924 Act and those similarly situated who received such notice after its passage. There was no good reason why any such distinction should have been made.

CONCLUSION

To sustain the petitioners it must be held that the reference to assessments in Section 278(d) is only to those made after the passage of the Act of 1924, or that an extension of time to sue for collection of a tax "affects" an assessment.

The brief for the petitioners clearly analyzes the words of the statute and states the case against our contention. The weakness of the petitioners' case and the strength of the Government's rest on the fact that no good reason has been suggested or exists why Congress should have made a distinction between those assessments of taxes under prior Acts made before and those made after the passage of the 1924 Act, and the result of such a distinction defeats to some extent the declared purpose of Congress. Congress did not intend that delay in assessments should give the United States the benefit of a more favorable statute of limitations on suits.

It is a distinction which Congress promptly repudiated in the 1926 Act. The Revenue Act of 1924 is the most loosely drawn, in some respects, of any

of the recent Revenue Acts. There are ambiguities presented in this case. Since they relate to a statute of limitations and not to the imposition of the tax they may properly be resolved in favor of the United States.

Respectfully submitted.

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Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
SEWALL KEY,
Attorney.
J. LOUIS MONARCH,
Attorney.
EDWIN G. DAVIS,
Attorney.

NOVEMBER, 1928.

APPENDIX

Brownfield-Canty Carpet Company v. *C. A. Rasmussen, as Collector of Internal Revenue*

District Court for the District of Montana. No. 435. Decided July 22, 1927.

Distraint proceedings for collection of additional taxes for 1917, 1918, 1919, held to be barred by the statute of limitations.

DECISION

Plaintiff's motion for judgment on the pleadings granted. The only issue seems to be whether plaintiff paid the taxes under duress of distraint proceedings, which were barred by limitation.

The statutes are confused, ambiguous, conflicting, in which case the retroactive operation claimed by defendant must be rejected, upon authorities cited by plaintiff. *Shucab* v. *Doyle* (1922), 258 U. S. 529, 535 (Supp. U. S. Tax Cases 975); *U. S.* v. *Cabot*, District of Columbia, Supreme Court, June 15, 1926; *U. S.* v. *Whyel*, 19 Fed. (2nd) 260. (Copied from Commerce Clearing House, Inc., Vol. III, 1928, p. 8249.)

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The presence of the clause in Section 278 (c) (2) that the section shall not "affect" any assessment made before the passage of the Act may be explained by the fact that the clause in the second proviso in Section 250 (d) of the 1921 Act relating to final settlement of losses and deductions was repealed as of January 1, 1924, by the Act passed June 2, 1924, and except for the saving clause in Section 278 (c) (2) some assessments made between January 1st and June 2d would have been retroactively affected by being made invalid because levied too late.

So the repeal as of June 1, 1924, of the clause in the second proviso to Section 250 (d), relating to notice to the taxpayer before assessments, in the absence of the clause in Section 278 (c) (2) would have affected some assessments made between January 1 and June 2, 1924, by validating those otherwise invalid because of failure to give prior notice.

Appendix B

RELATED LIMITATIONS ON ASSESSMENT AND COLLECTION OF TAXES IN REVENUE ACTS

REVENUE ACT OF 1918

(C. 18, 40 Stat. 1057)

ADMINISTRATIVE PROVISIONS

SEC. 250. * * *

(d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. * * *

* * * In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

REVENUE ACT OF 1921

(C. 136, 42 Stat. 227)

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

SEC. 250. * * *

(d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed. * * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax. * * * and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act:

Provided further, That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due:

Provided further, That in cases coming within the scope of paragraph (8) of subdivision (a) of section 214 or of paragraph (8) of subdivision (a) of section 234:

(1) In case of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible,

the amount of tax or deficiency in tax due may be

REVENUE ACT OF 1924

(C. 234, 43 Stat. 253)

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (2) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921.

(*Repealed as of January 1, 1924. See Sections 283 and 1106(a).*)

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Appendix B

ASSESSMENT AND COLLECTION OF TAXES IN REVENUE ACTS OF 1918 TO 1928, INCLUSIVE

REVENUE ACT OF 1924

(C. 234, 43 Stat. 253)

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PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

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(1) The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

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SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

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(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 234 or paragraph (8) of subdivision (a) of section 234 of the Revenue Act of 1918 or the Revenue Act of 1921.

(Repealed as of January 1, 1934. See sections 283 and 1106(a).)

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REVENUE ACT OF 1926

(C. 27, 44 Stat. 9)

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

SEC. 277. (a) Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amounts of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court *without assessment* for the collection of such taxes shall be begun after the expiration of such period. [Italics supplied.]

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 234 or paragraph (8) of subdivision (a) of section 234 of the Revenue Act of 1918 or the Revenue Act of 1921.

REVENUE ACT OF 1928

(Act May 29, 1928)

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

SEC. 275. Except as provided in section 276—

(a) *General rule.*—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

NOTE.—*The 1918 Act did not repeal nor amend Section 277 (a) (1), (2) or (3), nor Section 278 (a) or (b) of the 1926 Act. It did amend (see Section 506) Section 278 (c) and (d) of that Act. Section 278 (c) of the 1926 Act as amended reads exactly as does Section 276 (c) of the 1928 Act (after substituting "277" for "275"), and Section 278 (d) of the 1926 Act was amended by adding thereto the following:*

" • • • before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. [Italics supplied.]

SEC. 276. Same—Exceptions.

(a) *False returns or no returns.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

SEC. 283. This title shall take effect as of January 1, 1924.

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TITLE XIV—GENERAL PROVISIONS

REPEALS

SEC. 1400. (a) That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

(1) The following titles of the Revenue Act of 1916:

Title I (called "Income Tax");

(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes, and except that the unexpended balance of any appropriation heretofore made and now available for administration of any such part of an Act shall be available for the administration of this Act or the corresponding provision thereof: *Provided*, That, except as otherwise provided in this Act, no taxes shall be collected under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917, or Title I or II of the Revenue Act of 1917, in respect to any period after December 31, 1917. * * *

TITLE XIV—GENERAL PROVISIONS

REPEALS

SEC. 1400. (a) That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

Title II (called "Income Tax") as of January 1, 1921;

(b) The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes. * * *

TITLE XI—GENERAL PROVISIONS

REPEALS

SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

Title II (called "Income Tax") as of January 1, 1924;

The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts. * * *

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(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

SEC. 283. This title shall take effect as of January 1, 1924.

TITLE XI.—GENERAL PROVISIONS

REPEALS

SEC. 1101. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

Title II (called "Income Tax") as of January 1, 1924;

The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts. * * *

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of *any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto,* such tax may be collected by distraint or by a proceeding in court *(begun before or after the enactment of this Act)*, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. [Italics supplied.]

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

TITLE XII.—GENERAL PROVISIONS

REPEALS

SEC. 1200. (a) The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivision (b):

Title II (called "Income Tax") as of January 1, 1925, except section 257 and sections 271 to 282, inclusive;

(b) The parts of the Revenue Act of 1924 which are repealed by this Act shall (except as provided in sections 283 and 318 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1924, of all taxes imposed by prior income, war-profits, or excess-profits tax acts. * * *

(b) *Waivers.*—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(c) *Collection after assessment.*—Where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

SEC. 710. REPEALS

The parts of the Revenue Act of 1926 which are repealed by this Act shall remain in force for the assessment and collection of all taxes imposed thereby, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes.